P Mukundan a/l PK Kunchu Kurup & Ors v Daniel a/l Anthony and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS A-03(IM)(NCC)-50–05 OF 2016 AND A-03(IM)(NCC)-51–05 OF 2016
TENGKU MAIMUN, NALLINI PATHMANATHAN JJCA AND SURAYA OTHMAN J
4 JANUARY 2018

Bankruptcy — Notice — Setting aside — Proper mode — Whether complied with — Allegation that bankruptcy notice based on judgment which was not final — Judgment creditors obtained judgment against judgment debtors — Judgment did not state amount of interest — Whether amount due clarified or quantified — Whether judgment final — Whether bankruptcy notice liable to be set aside — Bankruptcy Act 1967 — Bankruptcy Rules 1969

Two appeals arose from the High Court relating the judgment obtained on 19 September 2011 ('the judgment') by the appellants, the judgment creditors ('the JCs'), against the respondents, the judgment debtors ('the JDs'). A bankruptcy notice ('the BN') was issued to the respective JDs, demanding for the payment of RM165,934.25. By way of an affidavit, the JDs applied to set aside the BN on the grounds that the BN was premised on a judgment which was not final and the amount due to the JCs had not been clarified or quantified. The JDs' application was dismissed by the senior assistant registrar. However, upon appeal to the judge-in-chambers, the High Court judge ('the HCJ') allowed the application and set aside the BN. The HCJ opined that: (a) a bankruptcy proceeding is an action to enforce a judgment within the meaning of s 6(3) of the Limitation Act 1953, in which case O 46 r 2 of the Rules of the High Court 1980 does not apply (*Ambank (M) Bhd (formerly known as AmFinance Bhd) v Tan Tem Son and another appeal* [2013] 3 MLJ 179 ('Tam Tem Son')); and (b) the JCs BN against the JDs was premature as it was premised on the 19 September judgment which was not final because the amount of interest could not be ascertained by looking at the said judgment. Hence, the present appeal.

Held, allowing the appeal:

(1) The HCJ erred in making reference to the judgment instead of the BN to see whether the amount to be paid by the JDs was ascertained and quantified; and finding that the judgment was not final and that the JCs needed to take another step or commence another action before they could issue the BN for the interest. The judgment had finally disposed of the rights of the JCs and the JDs. It put an end to the whole action filed

by the JCs. There was nothing more pending for determination insofar as the correctness of the 19 September judgment was concerned. No doubt the judgment did not quantify the interest and the costs. However, as at the date of the BN, interest was capable of quantification and was indeed quantified by the JCs. The amount demanded from the JDs was thus quantified, capable of execution and was in accordance with the judgment. The amount stated in the BN was the correct sum owing as at the date of the notice (see paras 19–22).

(2) The mode adopted by the JDs in applying to set aside the BN was wrong in law. The law on the application to set aside the BN is provided by s 3(1)(i) of the Bankruptcy Act 1967 ('the BA'). If a JD intends to challenge the BN on grounds that he has a counterclaim, set off or cross-demand which equals or exceeds the judgment debt which he could not set up in the action in which the judgment was obtained, the challenge must be by way of filing an affidavit under r 95 of the Bankruptcy Rules 1969 ('the BR') and it must be taken within seven days of the service of the BN. If the challenge is on grounds other than having a counterclaim, set off or cross-demand, the JD has to file an application under r 18 of the BR. The application by the JDs by way of affidavit under r 95 of the BR could not stand. The BN ought not to have been allowed by the HCJ. It was apparent from the HCJ's grounds of judgment that His Lordship allowed the setting aside of the BN premised on the sole ground that the judgment was not a final judgment, as the amount of interest could not be ascertained by looking at the said judgment. *Tan Tem Son* had no bearing on the HCJ's consideration that the judgment was not a final judgment (see paras 23, 26–27 & 30).

[Bahasa Malaysia summary

Dua rayuan berbangkit dari Mahkamah Tinggi berkenaan penghakiman yang diperoleh pada 19 September 2011 ('penghakiman') oleh perayu-perayu, pemiutang-pemiutang penghakiman ('JC') terhadap responden-responden, penghutang penghakiman ('JD'). Satu notis kebankrapan ('NK') dikeluarkan terhadap kedua-dua JD, menuntut bayaran RM165,934.25. Melalui satu afidavit, JD memohon untuk mengetepikan NK atas alasan NK berasaskan penghakiman yang tidak muktamad dan jumlah terhutang pada JC belum ditentukan atau dinyatakan jumlahnya. Permohonan JD ditolak oleh penolong kanan pendaftar. Walau bagaimanapun, melalui rayuan pada hakim dalam kamar, hakim Mahkamah Tinggi ('HMT') membenarkan permohonan tersebut dan mengetepikan NK. Hakim Mahkamah Tinggi berpendapat: (a) satu prosiding kebankrapan adalah tindakan menguatkuasakan penghakiman dalam maksud s 6(3) Akta Had Masa 1953 dan A 46 k 2 Kaedah-Kaedah Mahkamah Tinggi 1980 tidak terpakai (*Ambank (M) Bhd (formerly known as AmFinance Bhd) v Tan Tem Son and another appeal* [2013] 3 MLJ 179 ('Tam Tem Son')); dan (b) notis kebankrapan JC terhadap JD

A pra-matang kerana berasaskan penghakiman yang tidak muktamad kerana jumlah faedah tidak boleh ditentukan dengan melihat pada penghakiman tersebut. Oleh itu rayuan ini.

Diputuskan, membenarkan rayuan:

B

(1) Hakim Mahkamah Tinggi terkhilaf apabila merujuk penghakiman dan bukan NK untuk melihat sama ada jumlah yang perlu dibayar oleh JD telah ditentukan atau dinyatakan jumlahnya; dan memutuskan bahawa penghakiman tidak muktamad dan bahawa JC perlu mengambil satu lagi C langkah atau memulakan satu lagi tindakan sebelum mereka boleh mengeluarkan NK bagi faedah. Penghakiman akhirnya melupuskan hak-hak JC dan JD. Penghakiman tersebut menamatkan keseluruhan tindakan yang difailkan oleh JC. Tiada apa-apa yang belum selesai bagi pemutusan setakat yang berkaitan ketepatan penghakiman. Tidak D diragui, penghakiman tidak menyatakan jumlah faedah dan kos. Walau bagaimanapun, pada tarikh NK dikeluarkan, faedah boleh dikira malah telah dinyatakan jumlahnya oleh JC. Oleh itu, jumlah yang dituntut oleh JD telah dinyatakan jumlahnya, boleh dikuatkuasakan dan selaras dengan penghakiman. Jumlah yang dinyatakan dalam NK adalah jumlah E yang betul pada tarikh notis (lihat perenggan 29–22).

(2) Cara yang diguna pakai oleh JD dalam permohonan mengetepikan NK salah bawah undang-undang. Undang-undang mengetepikan NK diperuntukkan oleh s 3(1)(i) Akta Kebankrapan 1967 ('AK'). Jika F seorang JD berniat mencabar NK atas alasan dia mempunyai tuntutan balas, tolak-selesai atau tuntutan silang yang sama atau melebihi hutang penghakiman yang tidak boleh dirangka dalam tindakan yang daripadanya penghakiman diperoleh, cabaran ini mesti dibuat melalui pemfailan afidavit bawah k 95 Peraturan Kebankrapan 1969 ('PK') dan G mesti dibuat dalam tujuh hari penyerahan NK tersebut. Jika cabaran dibuat berdasarkan alasan selain mempunyai tuntutan balas, tolak-selesai atau tuntutan silang, JD perlu memfailkan satu permohonan bawah k 18 PK. Permohonan JD melalui afidavit bawah k 95 PK tidak boleh dikekalkan. Notis kebankrapan tidak sepatutnya dibenarkan oleh HMT. H Jelas berdasarkan alasan penghakiman HMT bahawa beliau membenarkan pengetepian NK atas alasan penghakiman bukan penghakiman muktamad kerana jumlah faedah tidak boleh ditentukan dengan melihat pada penghakiman tersebut. *Tam Ten Son* tiada kaitan dengan pertimbangan HMT bahawa penghakiman tersebut bukan satu I penghakiman muktamad (lihat perenggan 23, 26–27 & 30).]

Notes

For cases on setting aside, see 1(2) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 2661–3714.

Cases referred to

Ambank (M) Bhd (formerly known as AmFinance Bhd) v Tan Tem Son and another appeal [2013] 3 MLJ 179, FC (refd)
Captain Ho Fooi v Standard Chartered Bank Malaysia Bhd [2009] 4 MLJ 511, CA (refd)
Datuk Dr Kamal bin Mat Salih; ex parte Affin Bank Bhd, Re [2008] 8 MLJ 600, HC (refd)
Datuk Lim Kheng Kim v Malayan Banking Bhd [1993] 2 MLJ 298, SC (refd)
Development & Commercial Bank Bhd v Datuk Ong Kian Seng [1995] 2 MLJ 724, FC (refd)
Dr Shamsul Bahar bin Abdul Kadir v RHB Bank Bhd and another appeal [2015] 4 MLJ 1, FC (refd)
Fawzia bte Osman v Bank Bumiputra Malaysia Bhd and another appeal [1991] 1 MLJ 426, SC (refd)
Ghazali bin Mat Noor v Southern Bank Berhad and four other appeals [1989] 2 MLJ 142, SC (refd)
Jacob Rabindranath a/l M Krishnan v GP Autobat Sdn Bhd [2009] MLJU 106; [2009] 5 CLJ 104, CA (refd)
Low Mun v Chung Khiaw Bank Ltd [1988] 1 MLJ 263, SC (folld)
Tan Ah Poi: ex p Multi-Purpose Finance Bhd, Re [1999] 2 MLJ 555, HC (refd)

Legislation referred to

Bankruptcy Act 1967 s 3(1)(i)
Bankruptcy Rules 1969 rr 18, 95
Limitation Act 1953 s 6(3)
Rules of Court 2012 O 46 r 2(1)(a)
Rules of the High Court 1980 O 46 r 2

Norazali Nordin (Mohamad Nizam Mohamed Salleh with him) (Chong, Surinder, Su & Assoc) for the appellants.
Jegatheesa R (RJ Esa & Co) for the respondent.

Tengku Maimun JCA (delivering judgment of the court):

[1] There were two appeals before us filed by the appellants ('the judgment creditors') against the respondents, Daniel a/l Anthony and Kogilavaani a/p Suppiah respectively ('the judgment debtors').

BACKGROUND FACTS

[2] On 19 September 2011, vide Civil Suit No 22–83 of 2010 filed in the High Court at Ipoh, the judgment creditors/plaintiffs obtained judgment against the judgment debtors/defendants in the following terms:

A ... DIPERINTAHKAN bahawa Penyataan Pembelaan Defendan-Defendan yang bertarikh 30.9.2010 dibatalkan menurut Aturan 18 Kaedah 19 (1)(a) atau (b) atau (c) atau (d) Kaedah-Kaedah Mahkamah Tinggi 1980 atau Aturan 92 Kaedah (4) Kaedah-Kaedah Mahkamah Tinggi 1980 atau menurut bidangkuasa sedia ada Mahkamah;

B DAN ADALAH SETERUSNYA DIPERINTAHKAN bahawa Tuntutan Balas Defendan-Defendan yang bertarikh 30.9.2010 dibatalkan menurut Aturan 18 Kaedah 19 (1)(a) atau (b) atau (c) atau (d) Kaedah-Kaedah Mahkamah Tinggi 1980 atau Aturan 92 Kaedah (4) Kaedah-Kaedah Mahkamah Tinggi 1980 atau menurut bidangkuasa sedia ada Mahkamah;

C DAN ADALAH SELANJUTNYA DIPERINTAHKAN bahawa Penghakiman dimasukkan terhadap Defendan-Defendan seperti mana dalam Writ Saman dan Penyata Tuntutan;

DAN ADALAH JUGA DIPERINTAHKAN bahawa kos tindakan ini dan kos permohonan ini ditanggung oleh Defendan-Defendan dan dibayar kepada D Plaintif-Plaintif.

[3] Paragraph 25 of the statement of claim reads:

25. In the circumstances, the Plaintiffs pray for:

E i. an order restraining and or preventing the Defendants whether by themselves and or by their servants, agents and or employees whatsoever from liquidating, transferring, disposing and or dealing howsoever in respect of the said investment in the principal sum of RM1,250,000.00 known as 'CIMB All Stars Protected Noted — Investment ASPN 6065' F together with the profits invested with CIMB Bank Bhd until final disposal of this suit and all appeals arising therefrom or until further order of Court;

ii. an order declaring that the investment of RM1,250,000.00 known as 'CIMB All Stars Protected Noted — Investment ASPN 6065' together G with the profits invested with CIMB Bank Bhd is being held in trust by the Defendants for the 1st Plaintiff;

iii. an order that the Defendants do transfer the said investment in the principal sum of RM1,250,000.00 known as 'CIMB All Stars Protected H Noted — Investment ASPN 6065' together with the profits invested with CIMB Bank Bhd together with the profits to the 2nd and 3rd Plaintiffs as trustees pursuant to the said Trust dated 29.5.2009 within 7 days of date of Order of Court failing which the Honourable Court Registrar be empowered to execute all necessary documents to effect the said transfer;

I iv. in the alternative, in the event the said investment in the principal sum of RM1,250,000.00 known as 'CIMB All Stars Protected Noted — Investment ASPN 6065' together with the profits invested with CIMB Bank Bhd has been uplifted by the Defendants or has matured, the Defendants do return all of the said investment together with the due profits to the 1st Plaintiff or the 2nd and 3rd Plaintiffs as trustees;

v. interest at the rate of 8% per annum on RM1,250,000.00 and the due profits from the date the said investment is uplifted or the date of maturity on 9.5.2011 to the date of full satisfaction;

vi. costs; and

vii. any such further or other orders deemed fit by this Honourable Court.

[4] Aggrieved by the order of the High Court dated 19 September 2011, the judgment debtors appealed to this court. The appeal was dismissed. The judgment debtors' application for leave to appeal was also dismissed by the Federal Court.

[5] A bankruptcy notice dated 15 May 2015 was subsequently issued against the judgment debtors. The bankruptcy notice to the respective judgment debtor which was similar in terms demanded for payment of RM165,934.25, the particulars are as follows:

Jumlah penghakiman bertarikh 19.9.2011	RM1,250,000.00
Tolak: Bayaran pada 4.12.2012	RM1,250,000.00
Tambah:	
Faedah keatas RM1,250,000/= pada kadar 8% setahun	RM157,534.25
Dari 9.5.2011 hingga 4.12.2012 (575 hari)	
Kos	RM8,400.00
JUMLAH SEPERTI PADA 15.5.2015	RM165,934.25

[6] Vide an 'Afidavit Untuk Permohonan Mengenepikan Notis Kebankrapan' dated 18 June 2015, the judgment debtors sought to set aside the bankruptcy notice on several grounds, central being that the bankruptcy notice was premised on a judgment that was not final and that the amount due to the judgment creditors had not been clarified or quantified.

[7] The application of the judgment debtors to set aside the bankruptcy notice vide the affidavit was dismissed by the learned senior assistant registrar. The judgment debtors appealed to the judge in chambers. The appeal was allowed and the bankruptcy notice was set aside.

[8] In allowing the appeal and in setting aside the bankruptcy notice, the learned High Court judge considered only one issue ie whether the bankruptcy notice was issued pursuant to a final judgment. After alluding to the judgment dated 19 September 2011 and to para 25 of the statement of claim as set out at para [3] above, the learned judge said:

> [15] Persoalan yang berbangkit adalah, sama ada penghakiman yang diperoleh pihak JC terhadap JD adalah satu penghakiman

A muktamad yang membolehkan tindakan kebankrapan diambil terhadap JD. Berdasarkan perenggan 3(1)(i) Akta Kebankrapan 1967 (Akta 360), pihak JC hanya boleh memohon pengeluaran BN dari mahkamah setelah memperoleh satu perintah atau penghakiman muktamad ...

B [16] Jika diteliti perintah Mahkamah Tinggi tersebut, tuntutan faedah oleh pihak JC terkandung dalam subperenggan 25v Pernyataan Tuntutan, iaitu faedah dibenarkan pada kadar 8% setahun ke atas RM1,250,000.00 berserta dengan keuntungan dari tarikh Pelaburan tersebut dikeluarkan atau tarikh matang pada 9.5.2011 C sehingga penyelesaian penuh. Tarikh yang dituntut faedah dikenakan terhadap JD di dalam BN adalah dari tarikh matang pada 9.5.2011 sehingga penyelesaian penuh dan jumlah yang dituntut adalah RM157,534.25 (jumlah faedah tersebut).

[17] Jelasnya, jumlah faedah tersebut tidak ada tercatat di mana-mana D bahagian perintah Mahkamah Tinggi tersebut. Pihak JC yang membuat perkiraan sendiri dengan mengambil kira dari tarikh 9.5.2011 hingga 4.12.2012 iaitu tarikh matang sehingga ke tarikh CIMB memulangkan Pelaburan tersebut kepada pihak JC bagi tujuan pengiraan faedah iaitu untuk 575 hari.

E [18] Jumlah faedah tersebut juga tidak pernah dimaklumkan kepada JD. Tidak ada sebarang notis dikeluarkan atau notis tuntutan yang menuntut jumlah faedah tersebut yang dihantar kepada JD. Dengan itu, JD tidak tahu bahawa pihak JC akan membuat tuntutan ke atas faedah sehinggalah BN dikeluarkan. Pihak JD juga F tidak diberi peluang untuk mempertikaikan jumlah faedah tersebut melainkan jika ada notis tuntutan dihantar atau tindakan mahkamah diambil bagi menuntut atau menguatkuasakan jumlah faedah tersebut.

[19] Berdasarkan kepada fakta tersebut, JD tidak akan dapat mengetahui G jumlah faedah yang dituntut pihak JC dengan hanya merujuk kepada perintah Mahkamah Tinggi tersebut. Bagaimana JD boleh dikatakan atau boleh diklasifikasikan sebagai penghutang penghakiman sedangkan dia tidak tahu jumlah hutang jika merujuk kepada perintah Mahkamah Tinggi tersebut semata-mata. H Oleh itu, adalah didapati bahawa jumlah faedah tersebut bukanlah datangnya dari satu perintah muktamad mahkamah seperti mana dikehendaki undang-undang. Pihak JC perlulah mengambil satu lagi langkah bagi menjadikan tuntutan ke atas jumlah faedah tersebut menjadi perintah yang muktamad, iaitu dengan mendapatkan satu lagi perintah mahkamah yang memuktamadkan I jumlah faedah tersebut.

[9] The learned judge then cited *Ambank (M) Bhd (formerly known as AmFinance Bhd) v Tan Tem Son and another appeal* [2013] 3 MLJ 179, quoting, inter alia, that part of the judgment of the Federal Court stating that

a bankruptcy proceeding is an action to enforce a judgment within the meaning of s 6(3) of the Limitation Act 1953, in which case O 46 r 2 of the Rules of the High Court 1980 does not apply. His Lordship proceeded to conclude that:

> [23] ... tindakan pihak JC memfailkan BN terhadap JD adalah pra-matang kerana bersandarkan kepada satu penghakiman yang bukannya muktamad. Satu lagi langkah atau tindakan perlu diambil pihak JC bagi mendapatkan faedah seperti mana yang dituntut di bawah perintah Mahkamah Tinggi tersebut ...

[10] Dissatisfied with the decision of the High Court, the judgment creditors appealed to this court vide separate notice of appeal filed against the judgment debtors. For the reasons that follow, we had unanimously allowed the appeals.

THE APPEAL

[11] The judgment creditors raised three grounds of appeal, namely:

(a) that the learned judge erred in finding that the judgment was not a final judgment based on the reason that if the judgment debtors refer to the judgment dated 19 September 2011, they would not know the amount of interest being claimed by the judgment creditors;

(b) that the application to set aside the bankruptcy notice vide the affidavit filed by the judgment debtors was not in compliance with the Bankruptcy Act 1967 ('the Bankruptcy Act') and the Bankruptcy Rules 1969 ('the Bankruptcy Rules'); and

(c) that the learned judge erred in relying on the case of *Tan Tem Som* as the case had been overruled by the Federal Court in *Dr Shamsul Bahar bin Abdul Kadir v RHB Bank Bhd and another appeal* [2015] 4 MLJ 1.

[12] In support of his contention that the learned judge erred, learned counsel for the judgment creditors cited the following cases: *Low Mun v Chung Khiaw Bank Ltd* [1988] 1 MLJ 263; *Ghazali bin Mat Noor v Southern Bank Berhad and four other appeals* [1989] 2 MLJ 142; *Fawzia bte Osman v Bank Bumiputra Malaysia Bhd and another appeal* [1991] 1 MLJ 426 and *Re Datuk Dr Kamal bin Mat Salih; ex parte Affin Bank Bhd* [2008] 8 MLJ 600.

[13] Learned counsel for the judgment creditors submitted that the learned judge ought not to have considered the various issues raised by the judgment debtors in their 'Afidavit Untuk Permohonan Mengenepikan Notis Kebankrapan' as the judgment debtors had used a wrong mode to set aside the bankruptcy notice. Learned counsel relied on the decisions of the Supreme Court in *Datuk Lim Kheng Kim v Malayan Banking Bhd* [1993] 2 MLJ 298; *Development & Commercial Bank Bhd v Datuk Ong Kian Seng* [1995] 2 MLJ 724 and the decision of this court in *Captain Ho Fooi v Standard Chartered*

Bank Malaysia Bhd [2009] 4 MLJ 511.

[14] In opposing the appeal, learned counsel for the judgment debtors reiterated the position taken in the High Court that the judgment dated 19 September 2011 was not a final order as the profits and the interest had not been quantified and therefore requires a further order for completion, before the judgment creditors can commence bankruptcy proceedings.

OUR DECISION

[15] Section 3(1)(i) of the Bankruptcy Act provides:

> 3(1) A debtor commits an act of bankruptcy in each of the following cases:
>
> (i) if a creditor has obtained a final judgment or final order against him for any amount and execution thereon not having been stayed has served on him in Malaysia, or by leave of the court elsewhere, a bankruptcy notice under this Act requiring him to pay the judgment debt or sum ordered to be paid in accordance with the terms of the judgment or order with interest quantified up to the date of issue of the bankruptcy notice, or to secure or compound for it to the satisfaction of the creditor or the court; and he does not within seven days after service of the notice in case the service is effected in Malaysia; and in the case the service is effected elsewhere then within the time limited in that behalf by the order giving leave to effect the service, either comply with the requirements of the notice or satisfy the court that he has a counterclaim, set off or cross demand which equals or exceeds the amount of the judgment debt or sum ordered to be paid and which he could not set up in the action in which the judgment was obtained or in the proceedings in which the order was obtained:

[16] The learned judge found that the judgment dated 19 September 2011 was not a final judgment as 'JD tidak akan dapat mengetahui jumlah faedah yang dituntut JC dengan hanya merujuk kepada perintah Mahkamah Tinggi tersebut.'. In this regard, the judgment of the then Supreme Court in *Low Mun*, provides guidance.

[17] In *Low Mun*, the creditor obtained a final judgment against the debtor for the principal sum of RM2,325,000 together with interest and costs. Based on the said judgment, the creditor issued a bankruptcy notice against the debtor which, inter alia, contained the following demand:

> Take notice that within 7 days after service of this notice on you excluding the day of such service, you must pay to Chung Khiaw Bank Limited ... the sum of $2,325,000.00 together with interest thereon at the rate of 3% above the Judgment Creditors' base rate of interest per annum with monthly rests in respect of the sum of $2,100,000.00 and yearly rests in respect of the sum of $200,000.00 from the 27th day of February, 1983 until payment thereof and costs to be taxed claimed by

them as being the amount due on final judgment obtained by them against you in Johore Bharu High Court Civil Suit ... dated 21st day of January, 1985 whereon execution has not been stayed ...

[18] The judgment debtor challenged the validity of the bankruptcy notice and also of the service of the notice on him. After dealing with the challenge on the service, Mohamed Azmi SCJ said at pp 264–265:

We now move to the next argument which is based on a more substantial ground. The bankruptcy notice in this case neither specified the bank's base lending rate on which the interest payable should be calculated in accordance with the terms of the judgment, nor quantified the taxed costs. The reason for the omission was simply that at the time of issue of the notice, the base lending rate was not available and the costs of the proceedings had not been taxed ...

...

In our view, the demand for payment of interest and costs was wrongly included in the bankruptcy notice because it was only after the issue of the notice ie when the creditors petition was issued on January, 6, 1986 that the creditor was able to ascertain the base lending rate of '10.25%' per annum and also to quantify the costs at $9,880.50 after taxation. Clearly the bankruptcy notice was bad in law as it contained demand for payment of the whole judgment debt within seven days when parts of the whole debt had not been or could not be quantified, and as such were incapable of being made the subject of execution, and consequently incapable of being complied with. Non-compliance with the demand to pay such unascertained sums cannot constitute an act of bankruptcy. The demand for payment in the notice must not only be quantified but must also be the correct sum owing as at the date of the notice. In the circumstances, the bankruptcy notice should have made it clear that the demand for payment was limited only to the principal sum of $2.325 million, or both the interest and the costs should have been left out altogether and when their amounts had been ascertained, they could before adjudication, be made the subject of a separate bankruptcy notice. Alternatively, both the interest and the costs should be quantified first before notice was issued on the whole judgment debt ...

[19] Applying the above principle (which was reaffirmed by the Supreme Court in *Ghazali bin Mat Noor* and *Fawzia bte Osman*) to the instant appeals, we found with respect, that the learned judge erred in making reference to the judgment instead of the bankruptcy notice itself to see whether the amount to be paid by the judgment debtors was ascertained and quantified. The learned judge further erred in his finding that the judgment dated 19 September 2011 was not final and that the judgment creditors needed to take another step or commence another action before they can issue bankruptcy notice for the interest.

[20] The judgment dated 19 September 2011 specifically ordered that the judgment debtors do pay the judgment creditors interest at the rate of 8%pa.

The date when interest starts to run and when it ends was ascertained. The judgment debtors challenged the judgment right up to the Federal Court. They were unsuccessful in their challenge. The judgment dated 19 September 2011 had finally disposed of the rights of the judgment creditors and the judgment debtors. It puts an end to the whole action filed by the judgment creditors. There was nothing more pending for determination insofar as the correctness of the judgment dated 19 September 2011 was concerned. Even in cases where a judgment is pending appeal, a creditor is entitled in law to present a bankruptcy notice (see *Jacob Rabindranath a/l M Krishnan v GP Autobat Sdn Bhd* [2009] MLJU 106; [2009] 5 CLJ 104), what more when all avenues for appeal has been exhausted, as in the instant case. In the circumstances, we failed to comprehend how the judgment could not be said to be a final judgment (see *Re Tan Ah Poi: ex p Multi-Purpose Finance Bhd* [1999] 2 MLJ 555).

[21] No doubt the judgment did not quantify the interest and the costs, which could not in fact be quantified at that point of time simply because interest of 8%pa continues to accrue until full settlement of the sum of RM1,250,000 and costs had not been taxed. However, as at the date of the bankruptcy notice, interest was capable of quantification and was indeed quantified by the judgment creditors. The calculation which was at 8%pa from 9 May 2011–4 December 2012 (the date of full settlement) was as per the judgment dated 19 September 2011. As for costs of RM8,400, it was ascertained after taxation (see *Allocatur* at appeal record Vol 2: p 102).

[22] The amount demanded from the judgment debtors was thus quantified, capable of execution and was in accordance with the judgment. The amount stated in the bankruptcy notice was the correct sum owing as at the date of the notice.

[23] As for the mode adopted by the judgment debtors in applying to set aside the bankruptcy notice, we agreed with the appellant that the mode was wrong in law. The judgment debtors filed an application vide r 95 of the Bankruptcy Rules. Rule 95 provides that the filing of an affidavit shall operate as an application to set aside the bankruptcy notice. As can be seen from the affidavit (appeal record Vol 2: pp 52–62, the setting aside of the bankruptcy notice was sought for on various grounds.

[24] In *Datuk Lim Kheng Kim*, the Supreme Court was called upon to consider the effect of an affidavit in opposition filed to challenge the bankruptcy notice and the creditor's petition. Mohamed Dzaiddin SCJ (later CJ) said at p 302:

> We would observe here that the above affidavit, purportedly an affidavit to set aside the bankruptcy notice, fails to follow, both in form and substance, Form No 7 of the Rules, which contains the requirements of s 3(1)(i) pertaining to a debtor to 'satisfy

the court that he has a counterclaim, set-off or cross demand which equals or exceeds the amount of the judgment debt which he could not set up in the action in which the judgment was obtained ...'. A

[25] At pp 304–305 His Lordship continued: B

'Bearing in mind that his 'affidavit in opposition' ... contained multitude of grounds other than the existence of a counter-claim or set-off or cross demand, he should have made a formal application by motion supported by this affidavit in compliance with r 18, which reads:

> Application to be made by motion. C
>
> Except where these Rules or the Act otherwise provide, every application to the Court shall, unless the Court otherwise directs, be made by motion supported by affidavit.

In our opinion, failure on the part of the appellant to follow r 18 renders his 'affidavit in opposition' ineffective and bad in law because unless the court otherwise directs, challenges to the creditor's petition or bankruptcy notice other than that he has a counterclaim, set-off or cross demand which equals or exceeds the judgment debt, must be made by filing a notice of motion supported by an affidavit. D

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[26] The law on the application to set aside the bankruptcy notice as provided by s 3(1)(i) of the Bankruptcy Act and clarified by the above authority which is binding on the learned judge, is as follows. If a judgment debtor intends to challenge the bankruptcy notice on grounds that he has a counterclaim, set off or cross-demand which equals or exceeds the judgment debt which he could not set up in the action in which the judgment was obtained, the challenge must be by way of filing an affidavit under r 95 and it must be taken within seven days of the service of the bankruptcy notice. If the challenge is on grounds other than having a counterclaim, set off or cross-demand, the judgment debtor has to file an application under r 18 of the Bankruptcy Rules. F G

[27] The application by the judgment debtors in the instant appeal to challenge the bankruptcy notice vide the affidavit under r 95 of the Bankruptcy Rules which was not premised on the ground that they have a counterclaim, set off or cross-demand which equals or exceed the judgment debt, cannot therefore stand. The judgment debtors should have applied by way of a summons in chambers supported by affidavit, as mandated by r 18 of the Bankruptcy Rules. And as decided by the Supreme Court in *Datuk Lim Kheng Kim*, there was no effective and valid application as such by the judgment debtors. On this ground, the bankruptcy notice ought not to have been allowed by the learned judge. H I

[28] Learned counsel for the judgment creditors also argued that the decision

of the learned judge which relied on the judgment of the Federal Court in *Tan Tem Son* which had been overruled by the case of *Dr Shamsul Bahar*, cannot be sustained.

[29] Whilst it is true that the learned judge had cited the case of *Tan Tem Son* which essentially concerns the issue whether a judgment creditor requires leave of court under O 46 r 2(1)(a) of the Rules of Court 2012 prior to initiating a bankruptcy proceeding based on a final judgment which has been obtained more than six years, and that *Tan Tem Son* is no longer good law, we nevertheless found that nothing turns on this point.

[30] It was apparent from the learned judge's grounds of judgment that His Lordship decided to allow the setting aside of the bankruptcy notice premised on the sole ground that the judgment dated 19 September 2011 was not a final judgment, as the amount of interest could not be ascertained by looking at the said judgment. To our minds, *Tan Tem Son* had no bearing on the learned judge's consideration that the judgment dated 19 September 2011 was not a final judgment.

CONCLUSION

[31] In light of all the above, we were unanimous in our view that the learned judge was plainly wrong in allowing the judgment debtors' appeal against the order of the learned senior assistant registrar and in setting aside the bankruptcy notice. The judgment of the learned judge went against the weight of authorities decided by the apex court. The judgment creditors' appeals were therefore allowed with costs.

Appeal allowed.

Reported by Afiq Mohamad Noor